APPEAL NO. 92018

On December 19, 1991, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that respondent sustained a compensable injury to her right shoulder while stocking shelves and pulling supplies on (date of injury), and aggravated the injury on April 11, 1991, while in the course and scope of her employment when pulling supplies. The hearing officer awarded respondent all medical and income benefits due her under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant challenges the sufficiency of the evidence to support the hearing officer's findings and conclusion that respondent sustained compensable injuries on (date of injury) and April 11, 1991, and seeks reversal of the hearing officer's decision and the rendering of a decision for appellant.

DECISION

We affirm the hearing officer's decision and order awarding workers' compensation benefits to respondent.

Respondent testified that she had been employed as an administrative assistant for Professional Emergency Care Center ("Employer") since May 1990, and had not had a work related injury since 1972. Respondent described her Employer as an industrial medical care facility visited by employees who get hurt at work and by walk-in patients. Her many duties included office work as well as the purchase and stocking of supplies in the warehouse portion of Employer's facility, and the "pulling" of supplies from the warehouse for use in that facility and for distribution to the Employer's other emergency care centers in the area. While the times she worked in the warehouse varied, most of that work was performed on Thursdays. Prior to (date of injury), respondent testified she had no problem with her right shoulder. On the morning of (date of injury), a Thursday, while working alone in the warehouse pulling supplies before the center opened, respondent had to move two boxes of x-ray envelopes each of which weighed approximately 75 pounds and in so doing felt pain in her right shoulder. She slowed down her work pace somewhat and later went to a shelf to reach for some supply item. When she did so, her right shoulder "popped" loudly and she nearly fainted from the pain which she described as extreme. Shortly later, respondent went to the treatment area of the Employer's facility and saw the doctor on duty, ("Dr. E"), who was also an officer of the Employer's corporation. Respondent told Dr. E she had been pulling supplies, had picked up a large case of supplies when her shoulder started hurting, and, that when she reached for an item from a shelf her shoulder "popped." When Dr. E asked her if she had had any prior incidents of any kind respondent advised him that in early 1991 when walking out of her apartment onto the patio she slipped on ice "on the patio" but caught herself with her hands on a nearby window before she fell. According to respondent, she did not injure her shoulder in that incident and missed no days of work. Respondent said that Dr. E attributed her right shoulder injury to her slipping on the ice notwithstanding her insistence that she hurt it in the warehouse that morning. Dr. E ordered x-rays of respondent's shoulder, told her the "AC joint" showed a separation, and advised her to apply a heating pad or moist packs on the shoulder and return to work

In the Employer's medical records of respondent's (date of injury) visit

to Dr. E, the history portion recounted only that respondent had slipped "in the parking lot" of her apartment, put out her right arm to support herself, resisted flexion and felt pain. Dr. E's diagnosis was "accident due to fall" and "injury to right shoulder." Respondent testified that later in the morning on (date of injury), she told her supervisor, ("R.J."), about her injury, the circumstances of its occurrence, and also about Dr. E's attributing the injury to the incident of slipping on the ice. However, R.J. later testified that while she knew respondent was complaining of her right shoulder, she didn't become aware that respondent was contending she had a work-related injury until sometime later in May 1991 when the Employer's group health insurance carrier advised it would stop paying respondent's medical bills because the injury was work-related.

Respondent continued to see Dr. E at work periodically and would advise him that her shoulder was still hurting. Dr. E gave respondent pain relief and muscle relaxant medications, told her that it might become necessary to inject the shoulder, and advised her to put her right arm in a sling and keep working.

The Employer's medical records showed that respondent visited Dr. E on February 28, 1991, and told him of falling down some stairs a few days after he last saw respondent, that her right shoulder still bothered her (for instance in shifting gears and moving boxes in the warehouse), and, that on the previous day respondent had pain radiating down her arm when sliding boxes. Dr. E's notes of February 28th reflected he arranged for respondent to see C. ("Dr. P"), an orthopedic surgeon. Respondent testified that although Dr. P had already obtained most of her history from her Employer, she did tell Dr. P the major details of injuring her shoulder while pulling supplies at her job on (date of injury), and also about the earlier incident involving her slipping on the ice. However, in the history portion of the "Initial Examination" record of respondent, dated March 11, 1991, Dr. P recounted only that respondent "slipped and fell on the ice on 1-6-91, went to catch herself with her right shoulder and then a few weeks ago she was coming down some stairs and tripped down the stairs, again hung onto the hand rail and strained her right shoulder." No mention was made in that particular record of Dr. P of respondent's injury at work on (date of injury). During the March 11th visit, Dr. P injected respondent's shoulder with a steroid and an anesthetic, told her an MRI might later be necessary, and to return to work.

On April 11, 1991, a Thursday, respondent was pulling supplies in the warehouse, boxing them and wheeling them up to the front of the facility on a heavy dolly. She testified that her shoulder hurt very badly that morning and that she suffered another injury to her right shoulder in the warehouse that morning. Respondent said she was moving boxes and picked up a case of paper or something, and when she did so her right shoulder "pulled really hard" and caused her much pain. Respondent also said that when working at her desk she had to frequently pull and push a very heavy lower desk drawer when working on doctors' reports and that such activity hurt her right shoulder. Respondent's position at the hearing was that her warehouse work and pulling on the desk drawer continually hurt her shoulder and that on April 11th she reinjured or aggravated the right shoulder injury she first sustained at work on (date of injury). Respondent testified she told R. J. on April 11th that respondent had been in the warehouse pulling supplies and cleaning up including moving medical supplies, stationary, and computer paper (which was very heavy), and that her shoulder got

progressively worse that day. Respondent told R.J. she had suffered another injury and needed to take some of the pain medication from Dr. E to which R.J. responded, "OK."

Respondent said she completed her work on April 11th and later that evening, while driving her car in a heavy rain, she drove into some water flowing on the road and the steering wheel jerked about three inches pulling her shoulder which "grabbed again." This incident worsened respondent's pain which she described as having been "7 on a 10 scale" throughout that day. Respondent did not return to work after April 11, 1991. The next day she went to the John Peter Smith Hospital emergency room because her pain was much worse. After a lengthy wait, respondent left that hospital without being treated due to the volume of emergencies and went to Harris Methodist H - E - B. According to respondent, she told the doctor at Harris Methodist H - E - B about reinjuring herself at work on April 11th as well as the later incident with the steering wheel. The records of Harris Methodist described respondent's car hitting the water the previous night and the steering wheel jerking and forcing respondent's right arm to the left. However, these records also noted a "one degree joint separation Jan 1991."

Respondent next visited Dr. P on April 23, 1991, and his record of that visit states that respondent reported her shoulder pain as much worse, that she had aggravated her shoulder on the 11th at work lifting boxes of IV fluid, and had really aggravated it that night when the steering wheel wrenched out of her arm. Dr. P felt respondent had a "possible rotator cuff tear," ordered a scan, and told her not to work for the time being. Dr. P's record of respondent's next visit on May 7, 1991, indicated the MRI scan showed a little irregularity which may represent a tear of the supraspinatus tendon. Respondent subsequently severed her relationship with Dr. P and next consulted ("Dr. S").

Dr. S's initial orthopedic evaluation of respondent, dated May 13, 1991, contained the following: "HISTORY OF CHIEF COMPLAINT: On January 1, 1991, the patient slipped and fell on some ice. She states she did not notice any pain to her shoulder at that time. The patient also injured her shoulder on (date of injury), while picking up a box of medical supplies. After that incident, she states she noticed pain while raising her arm . . ." On May 31, 1991, Dr. S performed arthroscopic surgery on respondent's right shoulder with acromioplasty, excision of the subacromial bursa, and division of the coracocromial ligament. Dr. S's post-operative diagnosis of respondent's condition was "Stage II impingement syndrome, right shoulder." Respondent continued to see Dr. S periodically following her surgery and was released to return to work as of October 31, 1991, with restrictions on lifting.

The thrust of appellant's efforts at the hearing below was to show that respondent's shoulder injury was not causally connected to her employment and that respondent failed to meet her burden of proof on causation. Appellant contended that while respondent did have a problem with her right shoulder, her history showed it was attributable to the incidents of slipping and falling on ice at her apartment in early January 1991, to slipping and falling on stairs at her apartment complex sometime after (date of injury), the date respondent allegedly sustained the first work-related injury to her shoulder, and to having had the steering wheel in her car jerked from her hands on the evening of April

11th following the alleged aggravation of respondent's right shoulder injury at work earlier that day. Appellant further contended that respondent's medical records are the "strongest evidence" that she did not sustain an on-the-job injury since the patient history in the records of Dr. E and Dr. P reflected only the incidents involving respondent's mishaps on the ice and the stairs, and the Harris Methodist H - E - B records referred to the mishap with the steering wheel of respondent's car.

Respondent's supervisor, R.J., testified that respondent frequently complained of her shoulder and had problems with it; that respondent had told her about the incidents of falling on the ice and on the steps at the apartment complex; and, that respondent called to advise R.J. about the incident with the car steering wheel and reinjuring her shoulder but did not then mention any work-related reinjury of the shoulder on April 11th. According to R.J., the Employer's group health insurance carrier paid the Employer's claims for treatment in January and February. However, that carrier advised the Employer in late May 1991 that it would not pay claims for respondent's medical expenses for April and this was the first notice R.J. had that respondent was claiming to have sustained a work-related injury. R.J. also testified that approximately 60 percent of the Employer's patients are referred by employers for work-related injuries; that more than 100 employers use the Employer's facility; and, that the Employer rarely experiences any workers' compensation claims from its own employees. She denied that the Employer's own doctors failed to record all of the history given by patients.

Respondent contended at the hearing that she did not injure her right shoulder by slipping on ice on her patio in early January 1991, missed no work after that incident, and had no right shoulder injury prior to the first work-related injury on (date of injury). In respondent's view, Dr. E, an officer of the Employer, tried to find causes for respondent's injury unrelated to her employment. Respondent said that while her slipping on the stairs and later having the steering wheel jerked from her hands aggravated her initial shoulder injury of (date of injury), it was also continuously aggravated at work when picking up large cases of supplies and when opening and closing her heavy lower desk drawer. She asserted that she did aggravate the shoulder injury at work in the warehouse on April 11th, and, that she told R.J. of both work-related injuries. Respondent pointed to certain entries in the medical records of Dr. P and Dr. S, and the records of Harris Methodist

H -E - B and of Northeast Community Hospital (where respondent underwent the arthroscopic surgery) which made reference to her work-related activities.

Appellant asserts on appeal that the hearing officer must have misperceived the fundamental thrust of supervisor R.J.'s testimony to have so obviously rejected it while accepting respondent's testimony. Appellant urges that R.J.'s testimony was not that she was unaware of respondent's shoulder problem until May 1991, but that she was unaware until that time that respondent claimed her injury was work-related. Had the hearing officer not had such a basic misunderstanding, argues appellant, she would have rejected respondent's testimony and been more open to the persuasion of the medical records of Dr. E and Dr. P which contain no patient history of a work-related injury. The various medical records in evidence, however, were inconclusive in terms of their

references to respondent's work-related injuries. Each party was able to and did point to the presence or absence of such references in the several exhibits to support their respective positions that respondent's injuries were or were not caused by work-related activities.

To be compensable under the 1989 Act, respondent's shoulder injury must have arisen out of and in the course and scope of her employment. Article 8308-1.03(10) (1989 Act). Respondent was not required to prove that her injury on (date of injury), was the sole cause of her disability nor was there a fixed rule by which respondent had to prove the fact of her injury. INA of Texas v. Howeth, 755 S.W.2d 534, 536 (Tex. App.-Houston [1st Dist] 1988, no writ). Respondent was required to prove that her work-related injury was a "producing cause" of her disability. *See* Travelers Insurance Company v. Rodriquez, 453 S.W.2d 857, 859 (Tex. Civ. App.-Eastland 1970, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 91111 (Docket No. HO-00056-91-CC-1) decided January 30, 1992; and, Texas Workers' Compensation Commission Appeal No. 91119 (Docket No. BU-00041-91-CC-1) decided February 7, 1992. The hearing officer found both that respondent sustained a compensable injury on (date of injury), and aggravated that injury in the course and scope of respondent's employment on April 11, 1991. These findings were not based upon insufficient evidence nor were they against the great weight and preponderance of the evidence. In re King's Estate, 150 Tex. 662 244 S.W.2d 660 (1951).

Though not articulated precisely in terms of the "sole cause" defense either below or on appeal, appellant's contentions that respondent sustained prior injuries to her right shoulder when she slipped on the ice in early January 1991, and again when she slipped on some stairs before the April 11th injury at work, and a subsequent injury when her car's steering wheel was jerked in her hand certainly suggested that defense. In Texas Employers Insurance Association v. Page, 553 S.W.2d 98, (Tex. 1977), the court, in considering the sole cause defense, held that the mere fact that a claimant had a pre-existing injury which aggravated the injury complained of doesn't *ipso facto* defeat recovery since the carrier must show the preexisting injury to have been the sole cause of claimant's present incapacity. "To defeat a claim for a current injury because of a pre-existing or subsequent injury, the burden is on the carrier to show that the preexisting or subsequent injury is the sole cause of the present incapacity. Gonzales v. Texas Employers Insurance Ass'n, 772 S.W.2d 145 (Tex. App.-Corpus Christi 1989, writ denied); Evans v. Casualty Reciprocal Exchange, 579 S.W.2d 353 (Tex. Civ. App.-Amarillo 1979, writ ref'd n.r.e.); Webb v. Western Casualty And Surety Co., 517 S.W.2d 529 (Tex. 1974). And, an injury may be compensable even though aggravated by an existing injury or condition, or by a subsequently occurring injury or condition. Hardware Mutual Casualty Co. v. Wesbrooks, 511 S.W.2d 406 (Tex. Civ. App.-Amarillo 1974, no writ); Guzman v. Maryland Casualty Co., 107 S.W.2d 356 (Tex. 1937)." Texas Workers' Compensation Commission Appeal No. 91038 (Docket No. TY191-067901/01-CC-TY41) decided November 14, 1991, pp 5-6. *See also* Texas Workers' Compensation Commission Appeal No. 91085A (Docket No. SA-00050-91-CC-1) decided January 3, 1992, and, Texas Workers' Compensation Commission Appeal No. 91117 (Docket No. WH-00010-91-CC-1) decided February 3, 1992. Appellant failed to present evidence sufficient to establish that respondent's incapacity was solely caused by non-compensable injuries she sustained before or after her work-related injuries of (date of injury) and April 11, 1991.

Respondent was the sole source of testimony as to how her injury occurred on (date of injury) and how she aggravated such injury working in the warehouse on April 11th. Notwithstanding that she was clearly an interested witness, respondent's testimony could and did raise issues of fact for the fact finder. Gonzalez v. Texas Employers Insurance Ass'n, 419 S.W.2d 203, 208 (Tex Civ. App.-Austin 1967, no writ). As the sole judge of the credibility and weight to be given the evidence, the hearing officer accepted respondent's testimony as she was free to do. Article 8308-6.34(e) (1989 Act); Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The Employer's supervisor did not testify that respondent did not sustain compensable injuries on (date of injury) and April 11 1991. Rather, R.J. testified she didn't know respondent was asserting that her shoulder injuries were work-related until late May 1991 when the Employer's health insurance carrier would no longer pay the medical expenses for such injuries. As we earlier noted, the totality of the medical records with their relative presence or absence of references to work-related trauma were equivocal and inconclusive. We will not substitute our judgment for that of the hearing officer when the challenged findings are supported, as here, by some evidence of probative value. Texas Employer's Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). We find there is some evidence of probative value to support the hearing officer's findings and do not find them so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660, 662 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge